SANDERS, J. (dissenting)—The majority concludes Jeffrey Haley violated RPC 1.8(a) by entering into a business transaction with Ralph Guditz without advising him of the need to seek independent legal counsel and RPC 1.8(e) by advancing financial assistance to Guditz. I disagree. The letter agreement between Haley and Guditz was a fee agreement, not a business transaction. And Haley was no longer representing Guditz when he entered an agreement to finance the settlement of the Taylor lawsuit. However, the majority correctly concludes Haley violated RPC 1.8(h) by entering an agreement limiting his malpractice liability to Guditz, an unrepresented former client.

I. Haley Did Not Violate RPC 1.8(a) By Entering Into the September 16, 1993 Letter Agreement with Guditz

Haley did not violate RPC 1.8(a) because his September 16, 1993 letter agreement with Guditz was a fee agreement, not a business transaction. "A lawyer who is representing a client in a matter . . . . [s]hall not enter into a *business transaction* with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client" unless the terms are "fair and reasonable" and "fully disclosed," the lawyer advises the client to seek "independent counsel," and the client gives informed "consent[]." RPC 1.8(a) (emphasis added). Notwithstanding the majority's selective

quotation of *In re Disciplinary Proceeding Against Johnson*, 118 Wn.2d 693, 702, 826 P.2d 186 (1992), RPC 1.8(a) applies *only* to business transactions. Specifically, "[i]t does not apply to ordinary fee arrangements between client and lawyer." ABA Annotated Model Rules of Professional Conduct (ABA MRPC), R. 1.8 cmt. [1] (2003). *See also* WSBA Informal Ethics Opinion 1321 (Sept. 22, 1989), http://pro.wsba.org/io/search.asp. ("The Committee was of the unanimous opinion that RPC 1.8(a) does not apply to attorney/client fee agreements."). Indeed, an attorney-client business transaction is "'prima facie fraudulent'" in the limited sense "an attorney attempting to justify a transaction with his or her client has the burden of showing" its legitimacy. *In re Disciplinary Proceeding Against McGlothlen*, 99 Wn.2d 515, 525, 663 P.2d 1330 (1983) (quoting 7 C.J.S. *Attorney and Client* § 127 (1980). But an attorney-client fee agreement need not meet this burden.

On September 16, 1993, Haley and Guditz entered into a security agreement and a letter agreement. The security agreement secured legal fees owed to Graybeal, Jackson, Haley & Johnson (Haley's law firm), and the letter agreement established a fee agreement under which Guditz reimbursed Haley for bills submitted by Brady Johnson, an attorney who substituted as counsel of record for Guditz. The majority concedes Guditz obtained outside legal counsel to review the security agreement. Majority at 4. Accordingly, Haley did not

violate RPC 1.8(a) by entering into the security agreement.

A fee agreement must comply with both RPC 1.5 and RPC 1.8(a) when part of the fee consists of a business transaction or interest in the client's business. *See Cotton v. Kronenberg*, 111 Wn. App. 258, 271, 44 P.3d 878 (2002); *Holmes v. Loveless*, 122 Wn. App. 470, 475-77, 94 P.3d 338 (2004) (holding "the excessive fee and business transaction provisions overlap when attorneys and clients use business transactions as compensation for legal services"). *See also* ABA MRPC R. 18 cmt. [1] (noting requirements of RPC 1.8(a) "must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee"). A business transaction is a business transaction, whether or not it is also part of a fee agreement.

However, while RPC 1.8(a) applies to fee agreements in which a business transaction constitutes part of the fee, it applies only to the business transaction element of the fee agreement. Therefore, the letter agreement was a "business transaction" subject to RPC 1.8(a) only to the extent "compensation was directly linked" to the security agreement. *Holmes*, 122 Wn. App. at 475. But the security agreement in which Haley accepted a security interest in Guditz's business did not violate RPC 1.8(a). So the letter agreement did not violate RPC 1.8(a) either. Insofar as the letter agreement is distinct from the

security agreement, it is a fee agreement subject only to RPC 1.5, not a business transaction subject to RPC 1.8(a).

II. Haley Did Not Violate RPC 1.8(e) by Entering Into the September 24, 1993 Letter Agreement with Guditz

Haley did not violate RPC 1.8(e) because he was not "representing" Guditz when he entered into the September 24, 1993 letter agreement. "A lawyer who is representing a client in a matter . . . . [s]hall not, *while representing a client* in connection with contemplated or pending litigation, advance or guarantee financial assistance to his or her client." RPC 1.8(e) (emphasis added). The majority concedes Haley and Graybeal Jackson were "no longer representing Mr. Guditz and Octal" when Haley entered the letter agreement. Majority at 15. Accordingly, its conclusion Haley violated RPC 1.8(e) is inexplicable and plainly incorrect.

III. Haley Violated RPC 1.8(h) by Entering Into the September 24, 1993 Letter Agreement Limiting His Malpractice Liability to Guditz

Haley did violate RPC 1.8(h) by entering an agreement limiting his malpractice liability to an unrepresented former client. I would recalculate the sanction accordingly and therefore dissent.

AUTHOR:

Justice Richard B. Sanders

WE CONCUR: